

Date Issued: January 8, 1986 (AGO 86-1)

Requested by: Philip D. Papineau, Williams County Assistant
State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a violation of N.D.C.C. section 39-21-45.1, modification of a motor vehicle, constitutes an infraction under N.D.C.C. section 12.1-32-01.

II.

Whether a violator of N.D.C.C. section 39-21-45.1, who is unable to post bond, may be jailed until disposition of the offense.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a violation of N.D.C.C. section 39-21-45.1, modification of a motor vehicle, constitutes an infraction under N.D.C.C. section 12.1-32-01.

II.

It is my further opinion that a violator of N.D.C.C. section 39-21-45.1, who is unable to post bond, may be jailed until disposition of the offense.

- ANALYSES -

I.

N.D.C.C. section 39-21-45.1 provides, in part, as follows:

39-21-45.1. MODIFICATION OF MOTOR VEHICLE. Except as otherwise provided in this section, a person may not operate upon a public highway a motor vehicle of a type required to be registered under the laws of this state with a weight of seven thousand pounds >3175.14 kilograms! or less with alterations or changes from the manufacturer's original design of the suspension, steering, or braking system of the motor vehicle. The weight must be computed on the basis of the unmodified and unloaded weight of the motor vehicle, and without regard to any ballast that may be placed in the vehicle. . . .

In addition, this statute sets out further requirements relating to bumpers, maximum body height, maximum bumper height, the size of tires, and maximum lift in the suspension system of a vehicle.

N.D.C.C. section 39-21-46(1) provides as follows:

1. It is unlawful for any person to drive or move, or for the owner to cause or knowingly permit to be driven or moved,

on any highway any vehicle or combination of vehicles which the actor knows to be in such unsafe condition as to endanger any person, or which the actor knows does not contain those parts or is not at all times equipped with lamps and other equipment in proper condition and adjustment as required in this chapter, or which the actor knows is equipped in any manner in violation of this chapter, or for any person to do any act forbidden or fail to perform any act required under this chapter. Any person who violates any of the provisions of section 39-21-08, 39-21-09, 39-21-10, or 39-21-14 shall be assessed a fee of ten dollars. Any person who, in violation of this chapter, drives, or any owner who causes or knowingly permits to be driven upon a highway, any vehicle or combination of vehicles which that person knows is unsafe or improperly equipped is guilty of an infraction.

The provisions of N.D.C.C. section 12.1-32-01(7) classify an infraction as a crime imposing, as punishment, a fine of not more than five hundred dollars. In addition, that section provides for an enhanced penalty upon conviction of a second infraction.

In addition to these statutory provisions, an examination of N.D.C.C. chapter 39-06.1 discloses the following:

1. N.D.C.C. section 39-06.1-10(3)(9) includes, as a "noncriminal violation," N.D.C.C. section 39-21-46(1) and assesses two points toward the loss of driving privileges;
2. N.D.C.C. section 39-06.1-09 includes as a "moving violation" a violation of N.D.C.C. chapter 39-21 "except sections 39-21-01, 39-21-44 and those sections within those chapters which are specifically listed in subsection 1 of section 39-06.1-08"; and
3. N.D.C.C. section 39-06.1-05(10) specifically excludes a violation of N.D.C.C. section 39-21-45.1 from the procedures set forth in N.D.C.C. sections 39-06.1-02 and 39-06.1-03.

Upon a review of these statutory sections, a conflict is presented as to whether or not a violation of N.D.C.C. section 39-21-45.1 is a criminal offense classified as an infraction or a noncriminal offense classified as a moving violation pursuant to N.D.C.C. section 39-06.1-09.

In a 1984 Attorney General's Opinion, 1984 N.D. Attorney General's Opinion 43, this office concluded that a violation of N.D.C.C. section 39-21-41.2 was a noncriminal traffic violation rather than an infraction. The North Dakota Legislature stated that a violation of that provision was an infraction and punishable by a fine not to exceed twenty dollars. Although the offense was stated to be an "infraction," this office classifies that it was obvious that the Legislature intended to treat a violation of the provisions of N.D.C.C. section 39-21-41.2 as a noncriminal traffic offense especially since it did not exclude such provision from general law under N.D.C.C. chapters 39-06.1 and 39-07 by declaring the same to be

a criminal offense under N.D.C.C. section 39-06.1-05.

As in the opinion cited above, N.D.C.C. section 1-02-38 provides the guidance for the determination of legislative intent. That statute provides as follows:

1-02-38. INTENTIONS IN THE ENACTMENT OF STATUTES. In enacting a statute, it is presumed that:

1. Compliance with the constitutions of the state and of the United States is intended.
2. The entire statute is intended to be effective.
3. A just and reasonable result is intended.
4. A result feasible of execution is intended.
5. Public interest is favored over any private interest.

Statutory interpretation necessarily requires a review of specific statutory provisions in light of other contradictory statutes dealing with the same subject matter.

An examination of the legislative history of N.D.C.C. sections 39-21-45.1 and 39-21-46 discloses that a violation of N.D.C.C. section 39-21-45.1 was classified as an infraction by the North Dakota Legislature prior to the 1985 Legislative Session. During the Transportation Committee hearings on House Bill 1271, which amended N.D.C.C. sections 39-06.1-05, 39-21-45.1, and 39-21-46(1), both Representative Rydell and Captain Arden Johnson of the North Dakota Highway Patrol stated that the penalty for the offense would be a moving violation subject to a twenty dollar fine. It is my understanding that a violation of N.D.C.C. section 39-21-45.1 was processed as a moving violation, a noncriminal traffic offense, by law enforcement authorities prior to the amendments adopted by the North Dakota Legislature set forth in House Bill 1271 and as found at 1985 N.D. Session Laws 431.

However, upon passage of House Bill 1271, a violation of N.D.C.C. section 39-21-45.1 became a criminal, rather than a noncriminal, traffic offense. Section 1 of House Bill 1271 amended N.D.C.C. section 39-06.1-05 by including a violation of N.D.C.C. section 39-21-45.1 within the various criminal traffic offenses excepted from the noncriminal traffic offense procedures authorized under N.D.C.C. sections 39-06.1-02 and 39-06.1-03.

N.D.C.C. sections 39-06.1-02 and 39-06.2-03 set forth those offenses which are deemed to be noncriminal and the procedures to be followed in their adjudication. N.D.C.C. section 39-06.1-02 provides, in part, as follows:

Any person cited, in accordance with the provisions of sections 39-07-07 and 39-07-08, for a traffic violation under state law or municipal ordinance, other than an offense listed in section 39-06.1-05 shall be deemed to be charged with a noncriminal offense and may appear before the designated official and pay

the statutory fee for the violation charged at or prior to the time scheduled for a hearing, or, if he has posted bond in person, as provided by section 39-07-07, or by mail, he may forfeit bond by not appearing at the designated time. (Emphasis supplied).

In addition, N.D.C.C. section 39-06.1-03 specifically excludes offenses listed in N.D.C.C. section 39-06.1-05 from its provisions.

By including a violation of N.D.C.C. section 39-21-45.1 within the exclusions of N.D.C.C. section 39-06.1-05, the North Dakota Legislature has deemed this statutory violation to be a criminal traffic offense notwithstanding references to the contrary in N.D.C.C. sections 39-06.1-09 and 39-06.1-10(3)(a)(9). As a result of this enactment, only violations of N.D.C.C. section 39-21-45.1 will be deemed to be a criminal traffic offense subject to the penalty authorized by N.D.C.C. section 39-21-46(1). Any violation other than N.D.C.C. section 39-21-45.1 as set forth in N.D.C.C. chapter 39-21 will continue to be classified as a noncriminal traffic offense in accordance with the statutory interpretation and construction as set forth in 1984 N.D. Attorney General's Opinion 43 and as referred to above.

II.

N.D.C.C. section 39-07-07 provides as follows:

39-07-07. HALTING PERSON FOR VIOLATING TRAFFIC REGULATIONS - DUTY OF OFFICER HALTING. Whenever any person is halted for the violation of any of the provisions of chapters 39-01 through 39-13, 39-18, 39-21, and 39-24, or of equivalent city ordinances, the officer halting that person, except as otherwise provided in section 39-07-09 and section 39-20-03.1 or 39-20-03.2, may:

1. Take the name and address of the person;
2. Take the license number of the person's motor vehicle; and
3. Issue a summons or otherwise notify that person in writing to appear at a time and place to be specified in the summons or notice.

A halting officer employed by any political subdivision of the state may not take a person into custody or require that person to proceed with the officer to any other location for the purpose of posting bond, where the traffic violation was a noncriminal offense under section 39-06.1-02. The officer shall provide the person with an envelope for use in mailing the bond.

N.D.C.C. section 39-07-09 provides as follows:

39-07-09. OFFENSES UNDER WHICH PERSON HALTED MAY NOT BE ENTITLED TO RELEASE UPON PROMISE TO APPEAR. The provisions of section 39-07-07 shall not apply to a person if:

1. The halting officer shall have good reason to believe such person guilty of any felony or when such person is halted and charged with any of the offenses listed in section 39-06.1-05, except reckless driving; or
2. The halting officer, acting within his discretion, deems it inadvisable to release such person upon his promise to appear when halted and charged with either of the following offenses:
 - a. Reckless driving.
 - b. Driving in excess of speed limitations established by the state or by local authorities in their respective jurisdictions.

The halting officer forthwith shall take any person not released upon his promise to appear before the nearest or most accessible magistrate.

By its specific language, N.D.C.C. section 39-07-09 does not permit a summons or a promise to appear to be issued pursuant to the provisions of N.D.C.C. section 39-07-07 if a "person is halted and charged with any of the offenses listed in section 39-06.1-05, except reckless driving." Since a violation of N.D.C.C. section 39-21-45.1 is listed in N.D.C.C. section 39-06.1-05, the person halted and charged with such an offense may not be released upon a summons or written promise to appear. This statutory violation is not a noncriminal offense under N.D.C.C. section 39-06.1-02. Therefore, an officer may then take the violator into custody or require that person to proceed with the officer to any other location for the purpose of posting bond.

A violation of N.D.C.C. section 39-21-45.1 will be treated as any other criminal traffic offense. If a violator is unable to post bond, that violator will be required to remain in custody until disposition of the offense. N.D.R.Crim.P. 46 is applicable to all classes of criminal offenses, including infractions. As in every other criminal offense, the court will impose one or more conditions of release which will reasonably assure the appearance of the violator for trial. The fact that an infraction, as defined in N.D.C.C. section 12.1-32-01(7), does not impose a jail sentence for a first offense will not prevent a violator of an offense classified as an infraction from being held pending disposition of the offense if the conditions of release which will reasonably assure the appearance of that person for trial cannot be met.

Although a violator of N.D.C.C. section 39-21-45.1 can be held in custody pending such violator's appearance or trial before the court, this does not mean that a court could not impose a bail-setting procedure to ensure that a person not be needlessly detained when detention serves neither the ends of justice nor the public interest. This is a matter, however, which will involve consultation with the court before whom violators of N.D.C.C. section 39-21-45.1 would appear. To temper the potentially harsh results of this opinion, I would encourage all prosecuting and court officials to establish a bail schedule for this offense, which may also include release upon

personal recognizance, to ensure a speedy release from custody of those persons charged with a violation of this section.

I will inform the 1987 North Dakota Legislature of the problems existing with the implementation of House Bill 1271. This will permit the 1987 Legislature to make what changes it deems necessary to this statutory provision.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts or the applicable provisions of law are amended or repealed.

NICHOLAS J. SPAETH
Attorney General

Assisted by: Robert P. Bennett
Assistant Attorney General